United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1587

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 74-1587

B

P/S

MICHAEL MEEROPOL and ROBERT MEEROPOL,

Plaintiffs-Appellants,

-against-

LOUIS NIZER and DOUBLEDAY & COMPANY, INC.,

Defendants-Appellees,

-and-

FAWCETT PUBLICATIONS, INC.,

Defendant-Intervenor-Appellee.

APPELLANTS REPLY BRIEF

MARSHALL PERLIN
36 West 44th Street
New York, N.Y. 10036
(212) 661-1886

SAMUEL GRUBER
218 Bedford Street
Stamford, Connecticut 06901
(203) 323-7789
Attorneys for Plaintiffs-Appellants

Samuel Gruber
Max R. Millman
Marshall Perlin
of Counsel

4

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

MICHAEL MEEROPOL AND ROBERT MEEROPOL,

Plaintiffs-Appellants, Docket No. 74-1587

-against-

LOUIS NIZER AND DOUBLEDAY & COMPANY, INC.,

Defendants-Appellees,

and

FAWCETT PUBLICATIONS, INC.,

Defendant-Intervenor-Appellee.

----------X

APPELLANTS' REPLY BRIEF

The Appellees in their brief failed to address themselves to the substantial legal issues raised by the Appellants. Rather they choose to sustain their position either by misstating the record on appeal or making claimed statements of fact which cannot be supported by any record reference or indeed by any fact.

In response to the substantial argument that the lower court had no jurisdiction in that the movant in the order to show

cause upon which the lower court's order is premised Fawcett was not a party to the action. The Appellees state on p. 5 of their brief the following:

> "Accordingly, on March 19, 1974, Fawcett and Doubleday moved by order to show cause before Judge Tyler in New York to stay the Appellants . . . (A 49-50)."

The record reference does not sustain such a statement and indeed the Appellees know that the statement is not true. It was Fawcett and Fawcett alone who moved on March 19, 1974 by order to show cause to stay Appellants. The Appellees ineffectively sought to repair this basic jurisdictional defect by the Callagy letter of March 20th. Neither that nor retroactive reconstruction of the record can sustain the jurisdictional defect underlying the order appealed from.*

In a paragraph starting on the bottom of page 9 of Appellees brief and carried over to page 10 in the Appellees "counter statement of the case" they describe an alleged meeting had between Doubleday, Fawcett and Nizer after the institution of the Connecticut action and set forth the rationale for their avoid-

*On pp. 14-15 of the Appellees brief Appellees seek to devise another rationale for sustaining the lower court's jurisdiction. In the footnote they argue in substance that "for practical purposes, Fawcett and Doubleday are one" and in any event they are represented by the same legal firm. Hence, it is of no moment that the order to show cause was applied for by Fawcett who was not a party to the action.

ance of the Connecticut court and their decision to avoid the request for a transfer by moving in the New York action for a stay to arrive at the "procedural avenue [which] best accomplished" the Appellees objectives. The entire record of the case is devoid of any reference to such a meeting or indeed to such a rationale. The only record reference found in that paragraph (A.51) is the opening page of Mr. Callagy's affidavit to the effect that he was making the application for the order to show cause in behalf of Fawcett. It would seem that this meeting, not reflected in the record, concluded that the Connecticut court should be avoided for two reasons. Appellees would have been required to inform the judge in the Federal District Court of the issues raised both by the transfer and the application for a temporary injunction and secondly they would have had to retain local counsel who would have had to become acquainted with the case. Both hardly afford weighty grounds for the improper and irregular devices utilized by the Appellees in the lower court.

On p. 7 of Appellees brief it is argued that the indemnification provision between Doubleday and Fawcett is both equal in scope with the Doubleday-Nizer indemnification and encompasses all of the issues raised in the Connecticut action. As noted in Appellants brief that is not the fact nor was such a

claim ever made by Doubleday or Fawcett in the lower court in any of the supporting papers that the indemnification provision between Doubleday and Fawcett covered all of the claims of the Connecticut action. (See Appellants brief pp. 9, 11, 14-15, 21). Since Appellees cannot cite any record reference to sustain their argument they advise, nevertheless, "suffice it to say" that Doubleday has agreed to indemnify . . . Fawcett from and against all claims asserted by Appellants." Surely not only does the record fail to support this statement but the party who would ultimately be liable, Nizer, remains silent.

This is the same error that was made by the lower court in its opinion when it stated that Doubleday "has agreed to indemnify Fawcett for claims resulting from its publication of the paperback version of the Nizer book." (A 132). The error of the lower court is compounded by the fact that Appellants in their moving papers contested the scope of the indemnification (A 97, 98, 107) and denied that it covered all of the issues raised in the Connecticut action. This was one of the fact issues which Appellants advised the lower court could only be resolved at an evidentiary hearing. No evidentiary hearing was held nor was there a transcript of the argument. The lower court

just summarily granted Appellees application and expressed annoyance by the fact that Appellants were raising "technical questions" and "legalisms". Unfortunately the questions raised were more than technical and had substantive impact upon the Appellants depriving them of their vested right to a jury trial and their right to be heard in the appropriate district court on their application for a temporary injunction against Fawcett.

On p. 4 of the Appellees brief reference is made to "extensive discovery proceedings". Admittedly there were written interrogatories and answers to them supplied by the Appellants. The depositions were delayed by the Appellees starting on January 29, 1974 whereupon Appellees immediately moved for the stay of the depositions pending the determination of the motion for summary judgment which was filed on January 30, 1974 and the discovery proceedings save for minor exceptions have been in a state of suspense and markedly curtailed by order of the lower court since February, 1974 during the pendancy of the motion for summary judgment directed to the second count of the complaint. Argument was had on March 1, 1974 on an application to defer the motion for summary judgment pending Appellants completion of necessary discovery addressed to the second count.

No action was taken by the lower court until July 31, 1974 when it rendered its opinion granting Appellees motion for summary judgment.*

The Appellants response to the distinction in the two actions arising out of Fawcett's prior notice and warning of copyright violation and false statements regarding the Appellants is that it is of no moment since Appellees are convinced that Appellants do not have a meritorious cause of action. That was not the issue before the lower court and in any event is not a valid or appropriate response. The merits of the causes of action after the trial are yet to be determined. The lower court's denial of a preliminary injunction is surely not dispositive of these issues. Indeed Appellees were aware of that fact and feared having the Connecticut court hear the argument on a preliminary injunction against Fawcett. Equally the lower court's opinion, which Appellants are appealing, in granting the motion for summary judgment on the second count is not now before this court although that issue too will be heard at an appropriate time.

The unwarranted attacks upon Appellants and their

*Appellees in their brief make comment about the lower court's opinion on the motion for summary judgment. That opinion and order is being appealed from and hence Appellants do not make any comment in response at this time.

attorneys for initiating the actions against the Appellees are unfounded and merely an attempt to divert the court from the substantial legal issues now before it.

The Appellants for the first time after being compelled to initiate these actions by reason of the wrongful writings of the Appellee Nizer and the publication by Doubleday and Fawcett, have spoken out in behalf of their parents' innocence. Of this they are proud and it does not afford any defense to the improper conduct of the Appellees or the erroneous order of the lower court. It little behooves Nizer and Doubleday who in their pleadings have acknowledged spending upwards of $120,000 to publicize the sale of the book and to sell paperback rights to Fawcett for approximately $335,000 plus additional royalties to complain that the Appellants speak out in defense of their parents, Julius and Ethel Rosenberg.

Respectfully submitted,

MARSHALL PERLIN
Attorney for Appellants

Copy rec'd
Satterlee + Stephens by Robert M Callagy
Attys for defts - Doubleday + Fawcett
August 13, 1974
4:15 pm

RECEIVED
AUG 13 1974 4:40 PM
Phillips, Nizer, Benjamin, Krim, & Ballon